No. 89-1263

IN THE

Supreme Court of the United States

October Term, 1989

William R. Fischer, The Estate of Betty L. Fischer, Montford R. Fischer, and Bonita G. Fischer,
Petitioners,

vs.

NWA, Inc., Northwest Airlines, Inc., and Simmons Airlines, Inc.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY OF PETITIONERS TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOSEPH M. ALIOTO
Alioto & Alioto
Twenty-Third Floor
650 California Street
San Francisco, California
94108
Telephone (415) 434-2100

Attorneys for Petitioners

DANIEL R. SHULMAN*
George R. Wood
Gray, Plant, Mooty,
Mooty & Bennett, P.A.
3400 City Center
33 South Sixth Street
Minneapolis, MN 55402
Telephone (612) 343-2800

**Counsel of Record*

1990 — Northwest Printing Co., 3010 2nd St. No., Minneapolis, MN 55411 — 588-7506

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

No. 89-1263

October Term, 1989

William R. Fischer, The Estate of Betty L. Fischer, Montford R. Fischer, and Bonita G. Fischer,
Petitioners,

vs.

NWA, Inc., Northwest Airlines, Inc., and Simmons Airlines, Inc.,
Respondents.

REPLY OF PETITIONERS TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Petitioners William R. Fischer, the Estate of Betty L. Fischer, Montford R. Fischer, and Bonita G. Fischer ("petitioners") respectfully reply to the briefs submitted by respondents NWA, Inc., Northwest Airlines, Inc., and Simmons Airlines, Inc. in opposition to the petition for Writ of Certiorari.[1]

Respondents contend that the important issues raised by petitioners to this Court need not be resolved in this case because: (1) Fischer Bros. and Northwest were not competitors, and therefore no antitrust injury exists; and

[1]Respondents NWA, Inc. and Northwest Airlines, Inc. will be collectively referred to herein as "Northwest."

(2) since the agreement between Northwest and Fischer Bros. contained a provision permitting it to be terminated on six months' notice, Fischer Bros. has suffered no antitrust injury. (Northwest Brief in Opposition, at 9-11; Simmons Brief in Opposition, at 8-11.) Respondents also seek to argue that petitioners have distorted the record in this case.

What is clear from the record, however, is that it is respondents who have distorted the facts in this case in an effort to dissuade this Court from granting the petition, and that the arguments raised by respondents in support of this attempt are meritless. Petitioners' request for a Writ of Certiorari should be granted so that this Court may fully consider the very real and relevant issues raised by petitioners in support of their petition.

ARGUMENT

I.

Fischer Bros. Competed with Both Northwest and Simmons.

Respondents first attack petitioners' request for a Writ of Certiorari by contending that no antitrust injury exists since Fischer Bros. did not compete with Northwest. In making this argument, respondents rely on general statements and assumptions that are unsupported by the record that was before the district court and the court of appeals. This record clearly demonstrates that Fischer Bros. was a competitor of both Northwest and Simmons, and that Northwest and Simmons concertedly used this competitive situation to force Fischer Bros. out of business.

Initially, the record is undisputed that Fischer Bros. competed with respondent Simmons both before and after

the merger of Northwest and Republic Airlines ("Republic"). Before the merger, Fischer Bros. and Simmons competed as regional air carriers for Northwest and Republic, respectively. Each sought to obtain passengers for their respective major air carrier on various routes in the Detroit-Ohio and Detroit-Greater Michigan markets. Fischer Bros. and Simmons also competed after the Northwest/Republic merger, since both were still servicing the same cities as before the merger. Indeed, one of the solutions to this two-carrier problem proposed by Fischer Bros. was for the two regional airlines to "compete" for a six-month period to determine which carrier should operate as the Northwest Airlink in these markets. Not surprisingly, both Northwest and Simmons rejected such a proposal, since it detrimentally affected their plans to force Fischer Bros. out of business.

The record is also clear that Fischer Bros. and Northwest were competitors, despite respondents' meritless protests to the contrary. The evidence of this competitive relationship is found in several sources. The agreement between Northwest and Fischer Bros. specifically stated that Northwest may provide "dual service" in markets served by Fischer Bros.:

> (c) *Dual Service*. Northwest retains the right to enter *any* market with its own equipment and crews. If Fischer Bros. already serves such market, it will not be precluded from continuing such service including the use of the Northwest identifier if the market is specified in this Agreement or its Annexes.

(Joint Appendix ("J.A."), at 2166-67 (emphasis added); *see* J.A. at 2166.) Thus, the agreement between Fischer Bros. and Northwest specifically called for competition be-

tween the two carriers—competition that Northwest wanted in order to control the action of its regional carriers.

Further evidence of the competition between Northwest and Fischer Bros. can be found in the statements made by Northwest to the Department of Transportation ("DOT") when it sought approval of its merger with Republic. While Northwest unpersuasively and belatedly attempts to minimize its statements to the DOT by arguing that when it said it competed with "regional airlines," it really meant regional airlines other than Fischer Bros., such is not the case. The record citations provided by Northwest in footnote 3 of its opposition brief do not refer to "unaffiliated" as opposed to "affiliated" regional carriers. (*See* J.A. 3676-78.) Nor could Northwest so limit its statement of competition, given the provisions of its agreement with Fischer Bros.

Moreover, Northwest's clam that its references to regional airlines in its arguments to the DOT meant "unaffiliated" regional airlines is, in its own words, counterintuitive. After the merger, Northwest held a monopoly of the commercial passenger traffic in Detroit. With its monopoly, the only real regional airline service effectively operating in such markets as Detroit and Minneapolis/St. Paul was Northwest. Thus, there were essentially no non-Northwest affiliated regional air carriers serving the Detroit market. Given this fact, Northwest's statements to the DOT regarding competition with regional air carriers must have included those regional carriers with which Northwest was affiliated. The only other possible conclusion is that Northwest misrepresented its potential competitive status at Detroit and Minneapolis/St. Paul to the DOT when seeking approval of its merger.

II.

Northwest Did Not Have the Absolute Right to Terminate Its Agreement With Fischer Bros.

Alternatively, respondents argue that Fischer Bros. suffered no antitrust injury because, regardless of what concerted action Northwest may have taken with Simmons, Northwest had the absolute right to terminate its agreement with Fischer Bros. by giving Fischer Bros. six months notice of its intent to do so. This argument, however, completely ignores the fact that, after the merger, Northwest held monopoly power in the Detroit and Minneapolis/St. Paul markets, and that Northwest exercised this power in a manner prohibited by the antitrust laws when it terminated Fischer Bros. contract.

It is the well-established law of this Court that a monopolist does not have the unqualified right to refuse to deal with a competitor. *See, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing*, 472 U.S. 585, 601-03 (1985); *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); *General Industries Corp. v. Hartz Mountain Corp.*, 810 F.2d 785, 802 (8th Cir. 1987). Where a monopolist's actions are "accompanied by unlawful conduct or agreement, or conceived in monopolistic purpose or market control," even unilateral actions will be found to transgress upon the antitrust laws. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 625 (1953); *see General Industries Corp.*, 810 F.2d at 802.[2]

[2]The analysis of this Court in *Aspen Skiing Co.* is particularly applicable to the case at hand. The Court noted that anticompetitive conduct could be found in a monopolist's election "to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years." 472 U.S. at 603. A similar situation exists with respect to the present case. Northwest's election to make a change in the "pattern of distribution" of regional air carrier services after obtaining monopoly power at Detroit and Minneapolis/St. Paul is indicative of anticompetitive conduct. This election, coupled with the evidence of Northwest's concerted action with Simmons, demonstrates that Northwest violated the antitrust laws.

This same analysis applies to the termination by Northwest of Fischer Bros.' contract. Given its monopoly power, Northwest's "right" to terminate its contract with Fischer Bros. was not absolute, as respondents would have this Court believe. Rather, Northwest was prohibited from acting in an anticompetitive fashion when it terminated Fischer Bros.' contract. Northwest, however, failed to meet this standard, as the record and petitioners' opening brief establish.

CONCLUSION

For the reasons stated hereinabove, respondents' arguments in opposition to the petition for a Writ of Certiorari are meritless. Petitioners therefore respectfully request that the Court grant their petition for a Writ of Certiorari.

Dated this 12th day of April, 1990.

GRAY, PLANT, MOOTY,
MOOTY, & BENNETT, P.A.
ALIOTO & ALIOTO
Counsel for Petitioners
Daniel R. Shulman
Joseph M. Alioto
George R. Wood